The evidence having satisfied me that the goods did not leave the ship in apparent good order and condition the plaintiffs are in my opinion entitled to succeed, because the shipowner has failed to bring himself within any one of the exception to his obligation carefully to carry the goods.

Even if I am wrong in concluding that the loss occurred in the ship then on the alternative possibility that the cause of the damage has not been explained I think that following the case of *Gosse Millard v. Canadian Government Merchant Marine*[3] the shipowners are still liable. In that case the learned Judge found that the damage to the shipment was due to the wetting received from rain during the stay of the ship at Liverpool and alternatively he found that the cause of the damage had not been explained and upon this alternative finding he held that the defendants had not discharged the onus which was on them to negative negligence on the part of their servants and to prove some excepted peril.

A further point was raised on behalf of the 1st defendants and that is that the Bill of Lading sets out the weight of the goods shipment and that there was no claim in this case for shortage of weight, and no evidence that the goods received were other than of the weight stated in the Bill of Lading. I do not think there is much substance in this argument. It is true that the Bill of Lading contains an admission as to the weight but contains no admission as to contents of the cases; but as I have pointed out earlier in this judgment I think the admission of the invoice and packing list as agreed documents constitutes an admission in these proceedings of the contents of the packages, and if the packages in fact contained the contents alleged when the goods were shipped and there was a shortage on arrival of 2,420 yards of material it follows that there must have been a shortage of weight equivalent to this shortage of yardage. I do not think that it is material that the claim is worked out on the basis of shortage of length rather than upon shortage of weight.

For the reasons above given I hold that the plaintiffs' claim against the 1st defendants must succeed.

As I read the Statement of Claim in this case the claim against the 2nd defendants is an alternative to the claim against the 1st defendants, and if this is right my decision against the 1st defendants must result in my giving judgment in favour of the 2nd defendants.

Apart, however, from the question of pleading I am of opinion that upon the facts as I have found them the plaintiffs cannot succeed against the 2nd defendants. I have already expressed the view that the goods arrived at the Harbour Board godown in substantially the same condition as when they left the ship. With regard to the period between the reception of the goods in the Harbour Board godown and the survey of the goods on behalf of the plaintiffs the evidence is that the damaged cases were immediately placed in the strong room and kept there under lock and key. I am of opinion there is no evidence upon which it could be found that any further damage or loss occurred in respect of these goods during this period of storage. Moreover, the Harbour Board did not give clean receipts in respect of these goods and there being thus no admission of receipt in good order and condition it would, in my opinion, require very strong evidence of actual loss during the time that the goods were under the care of the Harbour Board or evidence that the goods were actually received by the Board in good order and condition to establish liability. I can find no such evidence in this case.

It is, therefore, not necessary for me to decide the interesting but difficult questions of law which were argued before me upon the question of the liability of the Penang Harbour Board when goods are lost or damaged either during the process of lightering by the Board from ship to shore or during storage until delivery to the consignee.

In the result there will be judgment for the plaintiffs against the 1st defendants and judgment in favour of the 2nd defendants. I will hear such further argument as may be necessary on the question of the amount of the judgment and interest and on the question of costs.

Order accordingly.

Solicitors: *Conaghan, Wreford & Thornton; Presgrave & Matthews; Hogan, Adams & Allan.*

P. ODERNAMALL & CO. v. AMERICAN PRESIDENT LINES LTD. and PENANG HARBOUR BOARD (No. 2)

[O.C.J. (Spenser Wilkinson J.) October 14, 1955]

[Penang — Civil Suit No. 227 of 1951]

Costs — Action against two defendants — Whether order should be made for plaintiffs to recover from one defendant the costs they will have to pay to the other defendants — Bullock Order.

In this case the learned Judge having given judgment for the plaintiffs against the 1st defendants and judgment in favour of the 2nd defendants had to consider whether an order should be made for the plaintiffs to recover from the former the costs they will have to pay to the latter.

In exercising his discretion on the facts and circumstances of the case he refused to make an order that the plaintiffs recover from the 1st defendants the costs they will have to pay to the 2nd defendants.

Cases referred to in the judgment :—

(1) *Hong v. A. & R. Brown Ltd.* (1948) 1 All E.R. 185.

(2) *Bullock v. London General Omnibus Co.* (1907) 1 K.B. 264.

(3) *Besterman v. British Motor Cab Co. Ltd.* (1914) 3 K.B. 181.

ARGUMENTS AS TO COSTS.

I. K. Meek for the 1st defendants: There is no dispute as to the amount claimed, delay not due to fault of 1st defendants.

S. Thillaimuthu for the plaintiffs: Money should have been paid when claim was made.

R. D. Hume for the 2nd defendants: I ask for costs against the plaintiffs.

Thillaimuthu: It was 1st defendants who by the line they took made plaintiffs bring in 2nd defendants. 1st defendants should reimburse plaintiffs in respect of costs payable to 2nd defendants. Plaintiffs throughout took the line that goods were discharged in good order. 2nd defendants always said they were not. Test is — Was it reasonable for plaintiffs on the facts then known to sue 2nd defendants? Submit plaintiffs should not be saddled with costs. I think 2nd defendants should have costs from 1st defendants.

Hume: I think the Court cannot order payment by one defendant to another direct. Plaintiffs must pay in first instance.

Thillaimuthu: I agree with that proposition.

[**Spenser Wilkinson J.** decided not to allow interest. Judgment will be for plaintiffs against 1st defendants for $2,906.53 with costs and costs of 2nd defendants will be paid by the plaintiffs. Question whether plaintiffs may have the costs paid to 2nd defendants reimbursed by 1st defendants reserved.]

Thillaimuthu (on further argument as to costs): Question is whether plaintiffs should have their costs payable to 2nd defendants reimbursed by the 1st defendants. Joinder of parties — R.S.C., O. 16 r. 4; r. 7 and notes thereto — **The Esrom** (1914) W.N. 81 — **Mallal's** S.S. Practice pp. 74-78. **Sanderson v. Blyth Theatre Co.** (1903) 2 K.B. 533, 538, 541; **Bullock v. London General Omnibus Co.**(2); 1955 Annual Practice p. 241. Submit in this case 1st defendants so conducted themselves as to make it incumbent on plaintiffs to join 2nd defendants.

Fact of loss was admitted by 1st defendants and question of liability largely fought out between 1st and 2nd defendants. Letters from 1st defendants saying goods delivered in good order. 2nd defendants said not received in good order. I ask for **Bullock Order.**

Meek: My friend suggests that only point is whether joinder was reasonable. **Bullock** case has laid down that unsuccessful defendant may have to pay the costs of successful defendant. Those cases establish no rule. **Hong v. A. & R. Brown Ltd.**(1) Matter of discretion. **Donovan v. Cammell Laird Co.**, (1949) 2 All. E R. 82 at p. 90. Where there is doubtful point on which plaintiff fails an unsuccessful defendant will not have to pay the costs. **Butterworth's** Costs, Vol. I. at page 92. I must therefore convince Court that 2nd defendants need not have been joined. Also there may well have been some substantial objection in law why Harbour Board should not be liable in any event. As to reasonableness, 4½ years delay between loss in April 1951 and date of trial. Writ issued in October, 1951. Court commented on inability of 1st defendants' witness to remember details. Defence of 1st defendants is really a denial of liability, not casting blame on others. There was a denial of the loss. Refers to initial letter from 2nd defendants to plaintiffs outlining defence. Copy not sent to 1st defendants' Solicitors. That possible defence never in knowledge of 1st defendants' Solicitors, but was in the knowledge of Plaintiffs' Solicitors and they should have been warned in 1951. Claim in consequence made in identical terms against both defendants. Harbour Board Bye-laws. Bye-law cited No. 32. Bye-law No. 53. As to facts Court found on facts that 2nd defendants not liable.

Thillaimuthu: The 1948 case brings out again the fact that judge has a discretion. Must be examined judicially. In second case reference to where there is a joinder arising out of doubt as to law. Here the doubt was as to fact. Question of law not yet been decided and one cannot examine that. 1st defendants could have objected to joinder of 2nd defendants. Delay partly due to fact that "President Monroe" on the high seas, and the defendants wanted to call the ship's officer as a witness.

Meek: That is not the reason — he was not on the same ship.

Thillaimuthu: Submit Court will exercise discretion judicially. If 1st defendants had taken a different line of defence at the start then there would be no reason for 2nd defendants to be brought in.

Cur. Adv. Vult.

Spenser Wilkinson J. : —I took time to consider the full effect of the judgment of the Master of the Rolls in one of the cases cited (*Hong v. A. & R. Brown Ltd.*(1)) and I have come to the conclusion that this is not a case in which the unsuccessful defendant ought to be made to pay the costs of the successful defendant. The well-known *Bullock*(2) *case* and *Besterman's*(3) *case* were both cases in which the plaintiff was injured in a collision between two vehicles; and whilst I do not wish to be thought for a moment that what is called a *Bullock Order* should be confined to motor vehicle collision cases I feel that such cases do place a plaintiff in a very difficult position, because in most of such cases it is extremely difficult to form any view until the whole evidence has been given as to who was responsible for the accident.

In the present case the proposed defence of the 2nd defendants was well-known to the plaintiffs before the Writ was issued and whilst I do not suggest that there was anything improper in joining them as defendants I think the plaintiffs had sufficient knowledge of the main facts before the Writ was issued to join them or not to join them at their own risk as to costs.

The case of *Hong v. A. & R. Brown Ltd.*[1] makes it quite clear that there is no hard and fast rule with regard to these cases and the making of a *Bullock Order* was a matter of discretion. Exercising my discretion on the facts and circumstances of this case I therefore refuse to make the order asked for that the plaintiffs recover from the 1st defendants the costs they will have to pay to the 2nd defendants.

I think the situation will be met by my making no further order.

No further order.

Solicitors: *Conaghan, Wreford & Thornton; Presgrave & Matthews; Hogan, Adams & Allan.*

MOHANLAL GORDHANDAS SHETH v. BAN GUAN & CO.

[C.A. (Mathew C.J., Whyatt C.J. (S) and Buhagiar J.) October 14, 1955]

[K. L. — F.M. Civil Appeal No. 30 of 1955]

Practice & Procedure — Civil trial — Application for adjournment — When Court of Appeal can review the order of trial Court refusing adjournment — Injustice to one or other of the parties.

This was an appeal against an interlocutory order of the High Court refusing an adjournment in a civil trial. At the hearing of the appeal fresh evidence was submitted. In the circumstances of the case, —

Held: (1) if the learned Judge had the material before him which was produced before the Court of Appeal, he could have exercised his discretion in favour of the appellant; (2) an injustice might occur in this case if the appellant were deprived of his right to defend the suit and therefore the appeal must be allowed.

Case referred to:—

(1) *Maxwell v. Keun* (1928) 1 K.B. 645.

APPEAL against an interlocutory order.

J. S. H. Skrine for the appellant.

D. G. Rawson for the respondents.

Mathew C.J. (with whom **Whyatt C.J. (S.)** and **Buhagiar J.** agreed): — This is in effect an appeal against an interlocutory order of the Court refusing an adjournment. The learned judge did not have before him the material in support of the appellant's application for an adjournment which we have to-day as a result of admitting further evidence by way of affidavit. The learned judge had every reason to believe on the material before him that the appellant had known of the date of hearing several weeks previously. The learned judge exercised his discretion on what he must have regarded as a flimsy ground, that owing to passport difficulties the appellant could not return from India in time for the hearing of the case.

The case had been fixed by the Registrar on the 7th of May 1955 for hearing on the 7th of June 1955. It is apparent from the affidavits that the appellant was not aware of the hearing date until the 30th of May. This was due to the appellant's solicitor's letter informing him of the date of hearing reaching the appellant by surface mail and not by air mail. It is clear that the appellant could not have reached Kuala Lumpur for the hearing on the due date. It is true that, had the appellant been present on the hearing date, he would have found himself in the position that his amended defence was not before the Court, for sufficient steps had not been taken to file it. But this, in my view, is not material, for the question to be determined was whether the appellant had good grounds for succeeding on his application for an adjournment. Unfortunately, Mr. Skrine who made the application in the Court below was unable to place all relevant facts before the learned judge, as he had not at that stage been provided with all necessary material to support his application.

I am only concerned with the period between the 7th of May and the 7th of June, 1955, and no regard need be paid to the two earlier postponements in the hearing dates, as on the first occasion the case was taken out of the list by the Registrar, and on the second occasion the postponement was the result of leave being granted to amend the statement of defence. The present application was in fact the first application by the appellant for an adjournment.

In exercising its discretionary power to grant adjournments, the Court proceeds on the basis laid down by Atkin L.J. in the case of *Maxwell v. Keun*[1], in the following passage (at p. 657):—

". . . . in the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only be properly done to the other party by coming to that conclusion."

I agree with the following passage of the learned Lord Justice in the same case when he says (at p. 653):—

". . . . . the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned